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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LLOYD CHARLES TRUE, Defendant and Appellant.	E032956 (Super.Ct.No. FVI 06749) OPINION

APPEAL from the Superior Court of San Bernardino County. Rufus L. Yent, Judge. Affirmed.

Athena Shudde, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, David Delgado-Rucci and Elizabeth S. Voorhies, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant Lloyd Charles True guilty of 31 counts of committing a lewd act upon a minor,[1] 18 counts of using a minor to perform an obscene act,[2] and one count of aggravated sexual assault of a child.[3] The trial court sentenced defendant to an indeterminate term of 15 years to life for the aggravated sexual assault conviction, plus an aggregate determinate term of 80 years for the remaining convictions.

Defendant's sole contention on appeal is that the trial court abused its discretion in denying his four *Marsden*[4] motions for new counsel in violation of his Sixth Amendment right to effective, conflict-free representation. We find no abuse of discretion and affirm the judgment.

1. Factual and Procedural Background

In 1994, defendant and his wife, who were homeless, joined the Jesus and Friends Ministry Church. The couple began baby-sitting for children they had met through the church. Eventually, defendant and his wife, Jennifer True, moved into a shack located behind another residence. In mid-1997, they met Sherry Bell, who invited them to live in a room in her home. After two and a half months, Bell asked them to move out and they

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[1] Penal Code section 288, subdivision (a). Unless otherwise noted, all statutory references are to the Penal Code.

[2] Section 311.4, subdivision (c).

[3] Section 269, subdivisions (a)(1) and (4).

[4] *People v. Marsden* (1970) 2 Cal.3d 118.

refused. After defendant and Jennifer were arrested for assaulting Bell's son, Bell refused to allow them to return to her home.

On August 27, 1997, as Bell was gathering up the couple's belongings left in her home, she discovered two Polaroid cameras, five vibrators or dildos, and a bag containing hundreds of Polaroid pictures mostly taken in the couple's previous shack. The photographs depicted defendant wearing lingerie, the couple engaging in sexual acts with each other and with children, illuminated genitalia of sleeping children, acts of oral copulation, fondling, and other sex acts with children, and children masturbating themselves.

The police located the couple in a motel room with a child and arrested the couple. After receiving and waiving *Miranda*[5] warnings, defendant acknowledged to Sheriff's Detective Michael DiMatteo that defendant was the individual depicted in a photograph wearing a bra and women's panties and in another photograph orally copulating a child. Defendant claimed the child was his wife. He identified his granddaughter in another photograph.

An investigation resulted in identification of seven of the children depicted in the photographs and 26 additional unidentified children, some of whom were under the age of three.

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[5] *Miranda v. Arizona* (1966) 384 U.S. 436.

During the trial several of the victims testified to defendant's sexual offenses committed against them, and parents of other victims identified their children in the photographs.

Defendant testified as well. He denied taking photographs of or molesting any children. He denied he was the individual in the photograph of a man wearing a bra and panties and denied he told DiMatteo he was the individual. He claimed he was being framed because he had previously been a notorious drug lord.

In January 2002, the court suspended the criminal proceedings and ordered defendant evaluated for mental competency to stand trial. Defendant told the four court-appointed evaluators that he was unhappy with his attorney, John Hardy. He told two of his evaluators he believed his attorney was part of a conspiracy with the police and prosecutors to incarcerate him for being a drug lord. Hardy requested to be relieved as defendant's attorney. The court granted Hardy's motion and appointed Chuck Nacsin as defendant's new attorney.

Following a competency trial, the court found defendant competent and criminal proceedings were reinstated. Defendant and Jennifer were tried separately.

2. *Marsden* Hearings

Defendant contends the trial court abused its discretion by denying his four *Marsden* motions for new counsel in violation of his Sixth Amendment right to conflict-free, effective representation.

A. Procedural Background

On four separate occasions during the trial defendant moved for removal of his attorney, Chuck Nacsin, and each time, the court denied defendant's *Marsden* request. Prior to trial, defendant had been represented by several other attorneys. Defendant had expressed dissatisfaction with each attorney's performance and had succeeded in obtaining new counsel. The court appointed Nacsin on August 28, 2001, during the competency trial.

October 8, 2002, *Marsden* Motion

On October 8, 2002, the first day of the guilt phase of defendant's trial, defendant made a *Marsden* motion for new counsel. Defendant complained Nacsin had (1) failed to prepare his case for trial; (2) failed to visit him to discuss the case with him after the competency trial, (3) did not properly investigate the case, (4) accepted appointment on a death penalty case, resulting in delay of defendant's case for over a year, and (5) Nacsin made defamatory remarks regarding defendant during the competency hearing.

During the *Marsden* hearing, Nacsin responded that he had visited defendant after the competency trial and discussed the case and photos with him at length - for two hours. Nacsin acknowledged he had accepted a death penalty case but had also been working on defendant's case and had retained an investigator to work on the case. When the court asked Nacsin if he felt he could provide defendant with a vigorous defense, Nacsin replied, "I don't think I can assure [defendant] of anything." Nacsin added, "I

will do the best I possibly can do with the evidence I have to work with, . . ." The trial court denied defendant's *Marsden* motion, and proceeded with the trial.

October 29, 2002, *Marsden* Motion

On October 29, 2002, for the second time defendant moved to replace Nacsin with new counsel. Defendant argued (1) Nacsin was not adequately representing him, (2) Nacsin had threatened him, and (3) Nacsin failed to cross-examine witnesses or impeach witnesses with inconsistent statements.

In response to the court's inquiry as to whether Nacsin felt he could continue representing defendant, Nacsin stated he believed he could although defendant was a difficult client and defendant had threatened him. Nacsin added that he would not ask questions just because defendant wanted him to. The trial court denied defendant's *Marsden* motion.

November 18, 2002, Altercation

During the morning of November 18, 2002, out of the presence of the jury, defendant moved to dismiss on the ground his right to a speedy trial was violated. Defendant complained that Nacsin delayed the trial by going on vacation mid-trial while defendant sat in jail. The court responded that Nacsin's two week vacation was prepaid and the court had permitted him to take his vacation since there was no prejudice to defendant.

Defendant also complained Nacsin did not produce DiMatteo for cross-examination as to the chain of evidence regarding the photographs. The court inquired as

to whether DiMatteo would be testifying in the future and the prosecutor stated he was on medical leave but would be testifying the following day. Defendant responded that it was too late because the jurors had already seen the photographs. After the court denied defendant's motion to dismiss, defendant complained that the court had not told him that the reason the jury was in recess for two weeks was because Nacsin was on vacation. The court acknowledged this was true and then stated the court was ready for the jurors.

At this point, the reporter's transcript reflects the following discourse:

"THE DEFENDANT: You mother-fucking piece of shit.

"MR. NACSIN: You're a punk.

"THE DEFENDANT: Yeah, you're a punk. Quit pulling on my fucking arm.

"THE BAILIFF: I'm not pulling on your arms.

"THE COURT: Get the blinds down.

"THE DEFENDANT: They seen it already. You piece of shit.

"(Whereupon the defendant was escorted out of the courtroom.)

"THE BAILIFF: Chuck, are you okay?

"MR. NACSIN: Yeah."

After taking a recess, the court proceedings resumed out of the presence of the jury and defendant. The trial judge stated on the record that defendant had attacked Nacsin and there was a fight. The jurors were excused for the remainder of the day.

The next morning, out of the jury's presence, the trial judge described on the record the altercation as follows: "[Defendant] got out of his chair, leaned over and hit

Mr. Nacsin with his fist. Mr. Nacsin responded, there was an altercation." The court concluded defendant had attacked Nacsin unprovoked. The court noted it was possible some of the jurors saw the altercation.

The court then permitted counsel and defendant to state their recollection of what had occurred. Nacsin stated defendant "sucker-punched" him as Nacsin was sitting in his chair, turning to watch the jury enter the courtroom. Defendant kept trying to hit Nacsin. Nacsin backed up, and then fought back and hit defendant. Nacsin said he believed defendant intentionally instigated the fight to get a mistrial, "and I believe he's a coward." Nacsin added that after thinking long and hard about the matter, Nacsin believed he could still represent defendant professionally.

The court noted that the fact defendant had removed his eyeglasses before the altercation suggested defendant had planned the altercation. In response to the court's inquiry as to whether Nacsin felt he could continue to defend defendant vigorously, Nacsin replied that "quite honestly, your Honor, this isn't the easiest thing in the world to do -- [¶] [But] what I do in the courtroom today tactically would be no different than what I was going to do yesterday before this incident. . . . I have a tactic, and I know what I'm doing, and I will continue to do that, if that's what the Court wants me to do. And I leave it up to the Court."

The court stated it wanted Nacsin to continue representing defendant, and asked the prosecutor if she had anything to add. She stated she saw defendant stand up, punch Nacsin in the forehead and then defendant pulled his jacket over his head. Nacsin and

defendant then fought, with Nacsin punching defendant a couple times. Deputy Lansdown, who was nearby, got a control hold on defendant and two other officers grabbed defendant. Defendant continued to try and hit Nacsin. The prosecutor acknowledged that during the fight defendant had scratched the prosecutor's forehead.

When asked if defendant had anything to add, defendant who was shackled and sitting next to the defense investigator, rather than Nacsin, said he was not wearing his glasses at the time because he was having problems with his eyes being dry and itchy. He denied premeditating the fight and claimed Nacsin had said something to him that caused defendant to "snap."

The court then asked each juror individually if they observed anything unusual in the courtroom before entering. Juror No. 6 said that for a split second she saw someone holding back Nacsin in the courtroom. She did not see defendant or anything else. The juror said she did not mention what she saw to any of the other jurors and none of the jurors discussed it. They did not know what was going on.

Alternate juror No. 11 also said she saw someone holding back Nacsin in the courtroom and then let go of him. She also saw one of the deputies handcuff defendant. She observed this through the window for only a few seconds. One of the alternate jurors came up and asked what was going on. Juror No. 11 replied that "Somebody's holding back the defense attorney, and [defendant's] getting cuffs put on him." Juror No. 11 did not discuss the matter with any other juror. All of the other jurors indicated they did not observe the altercation.

After questioning each juror, the court concluded the jurors did not observe any prejudicial, harmful conduct during the altercation and proceeded with the trial.

November 20, 2002, *Marsden* Motions

The next morning, on November 20, 2002, defendant again asserted there was a conflict between him and Nacsin as a consequence of the previous physical altercation and requested new counsel. The court held a *Marsden* hearing, during which defendant complained Nacsin had not cross-examined any witnesses, had failed to object to the photographs, had failed to challenge DiMatteo's testimony on the identity of children in the photos, had not notified defendant's witness to appear at trial, and should have filed a speedy trial motion.

Nacsin stated that he was following a strategy based on the defense that defendant was not depicted in the photos and had not taken the photos or possessed them. Rather he had been framed because he was a notorious drug lord. Nacsin had thus not asked questions that would reinforce the People's witnesses' testimony, such as questioning prosecution witnesses regarding identification of defendant or his alleged acts of molestation. Defendant's dissatisfaction was typical. He had complained about every attorney that had represented him and "confabulates as he goes. He lies." Nacsin nevertheless agreed to continue representing defendant.

Later that same day, defendant again made a fourth *Marsden* motion to relieve Nacsin as his attorney and appoint new counsel. Defendant claimed Nacsin had made a

terrorist threat against him by telling him, "You're a dead man, Mr. True." Defendant also complained that Nacsin reacted angrily to everything defendant said.

Nacsin responded that he believed defendant again was trying to create a conflict. Nacsin said that when he had gone to visit defendant in jail to discuss his testimony, defendant had complained that Nacsin had not called certain witnesses. The two began shouting at each other, during which Nacsin had said to defendant, "you're dead" after defendant refused to agree to testify at trial. Nacsin explained that he said this because defendant's testimony was the only defense he had and if he did not testify, defendant would receive a life sentence and die in prison. The defense investigator who had been present confirmed Nacsin's version of the incident.

Defendant responded that he felt very threatened by Nacsin's statement that he was a "dead man" and it was made before Nacsin discussed testifying.

The trial court found that defendant was attempting to create a conflict and his version of Nacsin threatening him was not credible. Once again the court denied defendant's *Marsden* motion. Defendant denied he was manufacturing a conflict. Nacsin said he could continue to defend defendant if defendant testified. Defendant agreed to testify. The trial continued thereafter with Nacsin remaining as defendant's attorney throughout the remainder of the trial.

B. Legal Authority

Under *People v. Marsden*,[6] "[a] defendant is entitled to have appointed counsel discharged upon a showing that counsel '"'is not providing adequate representation'"' or that counsel and defendant '"'have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.'"' [Citation.]"[7]

Deprivation of a defendant's right to counsel involves not only constitutionally deficient representation, but also some deleterious effect on the defendant's trial as a result of counsel's performance. In establishing ineffective assistance, a defendant usually must show a reasonable probability that a more favorable outcome would have resulted absent counsel's failings.[8]

Unless there is a complete breakdown in the attorney-client relationship, disputes over tactics and a defendant's lack of trust in or disregard for his attorney are not sufficient grounds for relieving counsel.[9] The court also will not relieve defense counsel if the defendant manufactures a conflict to force substitution of counsel.[10]

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[6] *People v. Marsden, supra,* 2 Cal.3d 118.

[7] *People v. Earp* (1999) 20 Cal.4th 826, 876, quoting *People v. Memro* (1995) 11 Cal. 4th 786, 857.

[8] *People v. Lewis* (1990) 50 Cal.3d 262, 288, citing *People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on other grounds in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, footnote 10; *People v. Fosselman* (1983) 33 Cal.3d 572, 584; *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.

[9] *People v. Memro, supra,* 11 Cal.4th at page 857; *People v. Silva* (1988) 45 Cal.3d 604, 622.

[footnote continued on next page]

The decision "whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court, . . ."[11] Denial of the motion is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would substantially impair the defendant's Sixth Amendment right to assistance of counsel.[12]

C. Discussion

Defendant claims he was entitled to new counsel because there was a complete breakdown in his attorney-client relationship with Nacsin. He also denies manufacturing the breakdown.

The record supports the trial court's findings that Nacsin provided defendant with effective representation and was willing to represent defendant despite defendant's dissatisfaction with Nacsin and courtroom attack on him. The court reasonably concluded defendant provoked the altercation on November 18, 2002, and manufactured other instances of conflict as well. The record shows that defendant, unprovoked, punched Nacsin in the head. Up to that point, defendant had worn his glasses and, more than coincidentally, was not wearing them when he punched Nacsin.

[footnote continued from previous page]

[10] *People v. Smith* (1993) 6 Cal.4th 684, 696-697.

[11] *People v. Marsden, supra,* 2 Cal.3d at page 123.

[12] *People v. Webster* (1991) 54 Cal.3d 411, 435.

In addition, before the court appointed Nacsin, defendant had already changed attorneys several times due to defendant's dissatisfaction with their representation. Defendant had a history of not getting along with his attorneys and complaining that their performance was inadequate. In October 1999, he made a *Marsden* motion to remove attorney Ed Stoliker, which the court initially denied. Defendant renewed the motion in June 2000, and the court granted it and appointed John Hardy. Prior to Stoliker, defendant was represented by Ponce & Ritter and Brian Watson, whom defendant also complained did not represent him adequately.

Any conflict between defendant and counsel does not constitute an irreconcilable conflict where defendant has failed to make a good faith effort to work out their disagreements.[13] As to any detriment caused by his and Nacsin's strained relationship, defendant has no one else to blame but himself.[14]

The court reasonably refused to accommodate defendant's repeated requests to relieve Nacsin and appoint new counsel. Defendant had a history of being dissatisfied with every attorney who represented him and provoked conflict with his attorneys; the verbal assaults between defendant and Nacsin were relatively insignificant in the context in which they occurred; the record supports the trial court's finding that defendant

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[13] *People v. Smith, supra,* 6 Cal.4th at page 696; *People v. Barnett* (1998) 17 Cal.4th 1044, 1086.

[14] *People v. Smith, supra,* 6 Cal.4th at page 696; *People v. Barnett, supra,* 17 Cal.4th at page 1086.

manufactured conflict between him and Nacsin; defendant's requests to remove Nacsin occurred midtrial and would have disrupted and delayed the proceedings; and Nacsin informed the court he was willing and able to continue vigorously representing defendant despite defendant's disruptive tactics.

As to defendant's complaints regarding the quality and effectiveness of Nacsin's representation, Nacsin informed the court he was following a strategy and felt that tactically it was not in defendant's best interests to do the things defendant complained should have been done. Nacsin was an experienced defense attorney and the record showed that he continued representing defendant in a professional manner despite defendant's disagreement with Nacsin's tactical decisions.

The record also does not reveal that defendant's right to counsel was substantially impaired. Although defendant disliked his attorney, defendant fails to show how his strained relationship with Nacsin affected his defense and undermined Nacsin's ability to represent defendant. Defendant argues that Nacsin's derogatory remarks regarding defendant reflected that subtle psychological influences were affecting his ability to represent defendant zealously. Defendant fails to show that Nacsin's performance detrimentally affected his trial or that Nacsin was incapable of providing him with a vigorous defense. Denial of a *Marsden* motion "'is not an abuse of discretion unless the

defendant has shown that a failure to replace the appointed attorney would "substantially impair" the defendant's right to assistance of counsel. [Citations.]' [Citation.]"[15]

We conclude the court did not abuse its discretion or violate defendant's Sixth Amendment right to effective representation by denying defendant's *Marsden* motions. There was sufficient evidence supporting the court's finding that during each *Marsden* hearing, defendant failed to show that his right to the effective assistance of counsel was substantially impaired or that there was a complete breakdown in the attorney-client relationship requiring appointment of new counsel.

3. Disposition

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/Ward
Acting P. J.

s/King
J.

[15] *People v. Barnett, supra,* 17 Cal.4th at page 1085, quoting *People v. Webster* (1991) 54 Cal.3d 411, 435.